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MICHAEL ROSAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No.

~~78-790~~

SHIPPERS DISPATCH, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RICHARD T. REMINGER
REMINER & REMINGER Co., L.P.A.

300 Leader Building
Cleveland, Ohio 44114
(216) 687-1311

Attorney for Petitioner

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Supreme Court of the United States

October Term, 1978

No.

SHIPPERS DISPATCH, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit**

Petitioner, Shippers Dispatch, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 17, 1978.

OPINIONS BELOW

The Memorandum and Order issued by the District Court for the Northern District of Ohio on October 28, 1976 and the Opinion of the United States Court of Appeals for the Sixth Circuit decided and filed August 17, 1978 appear in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 17, 1978. No Petition for Rehearing was filed. This Petition for Certiorari was filed within ninety (90) days of the date judgment was entered. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

- (1) Whether the wrongful and negligent formulation of standards for qualifications of truck drivers that causes increased risk and hazard to the users of the nation's highways and which directly caused damage to the Petitioner is actionable within the waiver of sovereign immunity contained in the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80?
- (2) Whether a claim that the United States was the active wrongdoer in causing an injury for which Petitioner is alleged to be liable states a claim for indemnity for which the United States "shall be liable" under the provision 28 U.S.C. § 2675?
- (3) Whether the "discretionary function" immunity for tort liability contained in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), allows government agents and agencies to arrogantly disregard the public interest by formulating standards for qualification of truck drivers without due care for the safety of the traveling public?
- (4) Whether by requiring Shippers Dispatch, Inc. to assume financial responsibility for unqualified individuals hired as truck drivers, the United States government has confiscated Shippers Dispatch, Inc.'s property without adequate compensation?

STATUTES INVOLVED

The pertinent statutory sections are 28 U.S.C. § 1346 (b), 28 U.S.C. § 2675 and 28 U.S.C. § 2680(a). They are reproduced in the Appendix attached hereto.

STATEMENT OF THE CASE

Shippers Dispatch, Inc.'s (hereafter Shippers) claim against the United States was filed as a Third Party action. The original lawsuit was filed in the Common Pleas Court of Lorain County, Ohio on November 12, 1975 by Monica Malone against Shippers for personal injuries and wrongful death resulting from a collision on September 3, 1975, in Carlisle Township, Lorain County, Ohio, involving the Malone vehicle and a tractor-trailer unit driven by Willie Hall and owned by Shippers. Shippers removed the case to the United States District Court for the Northern District of Ohio in order to assert its claim for indemnity under the Federal Tort Claims Act, 28 U.S.C. §§ 2675, *et seq.*

Prior to the collision of September 3, 1975, Shippers was compelled to hire Willie Hall pursuant to a consent decree entered in the case *United States v. Trucking Employers, Inc., et al.*, in the United States District Court for the District of Columbia, Civil Action No. 74-453. Pursuant to the decree in that case, Shippers was compelled to lower its hiring standards for truck drivers. The reduced standards were significantly less stringent than the standards previously used by Shippers. These standards were established by employees of the United States Government within the scope of their duties as employees.

By its Third-Party Complaint, Shippers has alleged that these imposed hiring standards were totally inadequate to protect the public from incompetent truck drivers. As a result, the failure of the United States Government employees to honor their duty of due care in formulating the standards placed Willie Hall on the road. It is alleged by Shippers that this action constitutes the primary active wrongdoing responsible for the accident of September 3, 1975. Shippers thereby invoked the jurisdiction of the District Court pursuant to 28 U.S.C. § 1346 (b) in its Third-Party Complaint against the United States.

In response to the Third-Party Complaint, the United States filed a Motion to Dismiss for lack of subject matter jurisdiction or, alternatively, for failure to state a claim upon which relief may be granted. The District Court by its Memorandum and Order of October 28, 1978, dismissed for want of jurisdiction and expressly declined to rule on the legal sufficiency of the claim of Shippers. The determination was certified as final and pursuant to Federal Rule of Civil Procedure 54(b), the District Court expressly determined there was no just reason for delay in entering final judgment in favor of the United States.

Appeal was taken to the United States Court of Appeals for the Sixth Circuit where the decision of the District Court was affirmed. The Court of Appeals grounded its decision on the failure of the Third-Party Complaint to allege wrongful conduct, and specifically relied upon Rule 12(b)(6) of the Federal Rules of Civil Procedure in affirming the District Court.

REASONS FOR REVIEW

I. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING THE PLEADING REQUIREMENTS NECESSARY TO INVOKE FEDERAL JURISDICTION UNDER THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 1346(b), 2671-80

In substance, both the District Court and the Court of Appeals for the Sixth Circuit have dismissed Shippers' Third-Party Complaint for failure to use the word "negligence" in that pleading. Such a narrow reading of the requirements necessary to invoke jurisdiction under the Federal Tort Claims Act is in direct conflict with this Court's determination that "notice pleading", or the allegation of facts sufficient to apprise an opponent of the claim presented is all that is required under the Federal Rules of Civil Procedure. See: *Conley v. Gibson*, 355 U.S. 42 (1957). Shippers has alleged that, as a result of its "passive and secondary" position vis-a-vis the "active and primary position of the United States Government in regard to a wrong jointly perpetrated upon Monica Malone, et al., a right of indemnity has arisen under Ohio law. This active versus passive distinction is a concept that is applied in Ohio between joint-tortfeasors. See: *Maryland Casualty Co. v. Fredricks*, 142 Ohio St. 605 (1944). The allegations contained in the Third-Party Complaint have clearly apprised the United States that Shippers seeks to impose tort liability on the United States. Under the direct language of 28 U.S.C. §§ 1346(b), 2674, if a right of indemnity for tort liability is granted by state law the claim is actionable under the Federal Tort Claims Act. *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

The Court of Appeals' reliance upon *Laird v. Nelms*, 406 U.S. 797 (1971) to support its affirmance of the District Court's Order of Dismissal is totally misplaced. *Laird* was a case where the claimant sought to impose liability upon the United States for the operation of supersonic military aircraft under the theory that the operation of such aircraft was an ultra-hazardous activity for which the Government was strictly liable in tort. Shippers does not allege any such strict liability theory herein. Shippers' only contention is that it is entitled to indemnity because, between Shippers and the United States Government, the more active and primary wrong perpetrated upon the Plaintiffs was that committed by agents of the Government.

II. THERE IS A PRESSING NEED FOR THIS COURT TO DETERMINE THE SCOPE OF THE IMMUNITY AFFORDED "DISCRETIONARY FUNCTIONS" UNDER 28 U.S.C. § 2680(a)

It has been over sixteen years since this Court by a 4-3 majority enunciated the interpretation of "discretionary function" contained in *Dalehite v. United States*, 346 U.S. 15, (1952). In that time, the intrusion of governmental activity into the private sector has increased to the point where almost no activity can be undertaken without the direct participation of government agents or agencies. Under subsequent interpretations of the dicta in the *Dalehite* decision, most if not all such participation is immunized from liability if it is carried out without due care. This case raises in stark terms the question of governmental accountability to the fundamental rules that govern human conduct. The effect of the present interpretation is to allow irresponsible decisions that affect the welfare of each and every citizen to be formulated with increasing arrogance and impunity. The actual source of injury and

suffering is untouched by legal process because the wrongdoers are clothed with an immunity that eliminates the need for government employees to exercise due care in the performance of their duties.

Under the position adopted by the government in this case it is possible to envision the promulgation of standards for other occupations that would have disastrous effects on the public. For instance, under the position of absolute immunity espoused, regulations for qualification as an airline pilot could be reduced to an absurdly low level. Hundreds of people could be killed or maimed and the government would argue that their discretion immunizes the decision. Such a position is an arrogant disregard of the public safety under the guise of "discretion".

This obviously troubling position has caused a great deal of confusion as the United States Circuit Courts of Appeal attempt to apply the language of *Dalehite*. What has developed is a distinction based upon the type of conduct for which liability in tort is sought to be imposed. Immunity is now conferred only when "planning level" decisions are the conduct alleged as negligent. See: *United Airlines v. Weiner*, 335 F.2d 379 (9th Cir. 1964). "Operational level" decisions are required to be made with due care. See: *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975). The "planning-operational" distinction has not been applied with any consistency by the Courts of Appeal. Compare: *Boston Edison Co. v. Great Lakes Dredge and Dock Co.*, 423 F.2d 891 (1st Cir. 1970) and *Downs v. United States*, *supra*. There is also conflict in the cases involving alleged negligent construction of a government project. Compare: *Sisley v. United States*, 202 F. Supp. 273 (D. Alas. 1962) with *Jennings v. United States*, 178 F. Supp. 516 (D. Md. 1959).

Shippers respectfully urges that this Court apply the principle utilized by the lower Federal Courts in cases where suit is brought by patients of Veteran's Administration hospitals when malpractice is claimed. See: *Dishman v. United States*, 93 F. Supp. 567 (D. Md. 1950); *Ruffino v. United States*, 126 F. Supp. 132 (S.D. N.Y. 1954) and *Santa v. United States*, 252 F. Supp. 615 (D. P.R. 1966). As authority these cases rely upon *Indian Towing v. United States*, 350 U.S. 61 (1955). In these cases the trial courts have determined that the "discretionary function" occurs at the time the government physicians opt to admit and treat the patients involved. Once this discretion is exercised the treatment must be carried out with due care. This case is analogous in that Shippers readily admits in arguendo that in filing suit against Shippers and other trucking employers the government exercised its discretion to rectify the alleged Title VII violations. However, this did not give the government freedom to disregard the public safety by failing to exercise due care in the formulation of hiring standards imposed upon Shippers and other trucking employers. The remedy drafted and imposed by the government attorneys is similar to a course of treatment administered by a government physician and no logical reason exists to distinguish between these professions in applying 28 U.S.C. § 2680(a).

This inconsistency of interpretation by the lower Federal Courts is particularly troubling when the context of the instant case is examined. The determination of whether the "discretionary function" immunity exists in this case has been treated by the District Court for the Northern District of Ohio and the Court of Appeals for the Sixth Circuit as a jurisdictional issue of mixed law and fact. By considering the "discretionary function" at a point in the procedure where the facts are virtually un-

known because discovery has not begun, Shippers has been effectively precluded from showing that a "discretionary function" was not involved in the conduct alleged to be wrongful. In the instant case, Shippers has been dismissed for failure to state a claim for relief when no evidence whatsoever has been received concerning the conduct Shippers contends is negligent. At this point, Shippers has been effectively precluded from obtaining information concerning the identity of the drafters of the lax hiring standards, as well as their positions within the Federal Government. Shippers respectfully contends that without such information it is impossible to determine whether the formulation of the inadequate standards for drivers eventually imposed upon the public was immunized by 28 U.S.C. § 2680(a).

III. THIS CASE RAISES ISSUES OF CONSTITUTIONAL SCOPE IN THAT THE INADEQUATE STANDARDS FOR DRIVER QUALIFICATIONS IMPOSED UPON SHIPPERS DISPATCH, INC. ARE TOTALLY ARBITRARY AND RESULT IN A DEPRIVATION OF PROPERTY WITHOUT ADEQUATE COMPENSATION

The primary effect of the consent decree entered in *United States v. Trucking Employers, Inc., et al.*, United States District Court for District of Columbia, Civil Action No. 74-453 was to establish a quota for minority drivers of 33-1/3% of the work force of over-the-road drivers employed by Shippers and the other Defendants in that case. To achieve this arbitrary quota the attorneys for the United States imposed hiring criterion upon Shippers and other employers of the trucking industry. The criterion imposed provided that an employer could no longer reject an applicant for having no driving experience or no high school

diploma or its equivalent, nor could the employer inquire as to an individual's arrest record. Shippers previously maintained standards which required high school educational equivalency, driving experience and honesty from applicants for employment.

It is Shippers' position that these reduced standards increased the number of accidents and also increased the severity of these accidents thereby causing the assets of Shippers to be reduced in order to pay claims which it would have otherwise not have had to pay.

Shippers respectfully submits that while the end the Government sought to provide equal opportunity of employment of minorities in the trucking industry is laudable, the means employed immediately required Shippers to expend large sums to train the under-qualified applicants and to pay for increased liability. Such a regulation is tantamount to a taking and must be compensated. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

For these reasons, Shippers respectfully requests that a Writ of Certiorari issue to review the judgment entered August 17, 1978, by the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD T. REMINGER
Attorney for Petitioner

Of Counsel:

REMINGER & REMINGER Co., L.P.A.
300 Leader Building
Cleveland, Ohio 44114
(216) 687-1311

APPENDIX

JUDGMENT ENTRY OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed August 17, 1978)

No. 77-3005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONICA MALONE, et al.,
Plaintiffs,

SHIPPERS DISPATCH, INC.,
Defendant-Third Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Third Party Defendant-Appellee.

Before: EDWARDS, KEITH and MERRITT, *Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if Necessary.

Entered by Order of the Court.

John P. Hehman, *Clerk*

By /s/ GRACE KELLER

Chief Deputy Clerk

Issued as Mandate: September 8, 1978

**OPINION OF THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

(Dated August 17, 1978)

No. 77-3005

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MONICA MALONE, *et al.*,
Plaintiff,

SHIPPERS DISPATCH, INC.,
Defendant-Third Party Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Third Party Defendant-Appellee.

ON APPEAL From the United States District Court for
the Northern District of Ohio.

Before: EDWARDS, KEITH and MERRITT, *Circuit Judges.*

MERRITT, *Circuit Judge.* The appellant, Shippers Dispatch, Inc., a truck line (herein called "Shippers"), appeals from a judgment of District Judge Manos in the Northern District of Ohio dismissing Shippers' third party defendant complaint against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80. The District Court dismissed the third party complaint for lack of subject matter jurisdiction. We affirm the judgment of the District Court. We hold that the complaint fails

to state a cause of action for relief under Rule 12(b)(6), Federal Rules of Civil Procedure.

Plaintiffs filed a damage suit in state court in Ohio seeking compensation for wrongful death and personal injuries against Shippers resulting from a collision involving their car and a truck owned by Shippers and driven by Shippers' employee, Willie Hall. Shippers removed the action to the United States District Court for the Northern District of Ohio on the basis of diversity of citizenship.

On January 13, 1976, the "Joint Answer of Defendants and Third Party Complaint of Shippers Dispatch, Inc." was filed naming the United States as the third party defendant and alleging that Shippers was compelled to hire the truck driver, Willie Hall, pursuant to a judicial decree in an equal employment civil rights case in the District of Columbia against a number of truck lines in which Shippers was one of the defendants. Shippers claim that it was entitled to full indemnification from the United States because "the legal position of Shippers Dispatch, Inc. is but passive, secondary and involuntary to the active, primary and mandatory position of third party defendant, United States of America." As a result of the equal employment civil rights case filed by the government, Shippers entered into a consent decree which, according to the complaint, "established mandatory provisions for the qualification for drivers to be hired . . . wherein a minimum of 33-1/3% . . . were to be of specific minority in origin [black and hispanic] and that such qualifications . . . were less than qualifications and standards" which Shippers had previously adopted, "all of which has resulted in increased accident exposure upon the highways." Shippers further alleged in the third party complaint that "pursuant to the aforesaid judicial [consent] decree . . . it was compelled to hire one Willie Hall,

a defendant herein . . . whose qualifications as an over-the-road driver did not meet the [prior] standards of Shippers . . . and that subsequently thereto one Willie Hall was involved in the aforesaid accident."

Thus, according to the complaint, Shippers established an affirmative action program for drivers to be hired and adopted goals or ratios for hiring pursuant to an agreement with the EEOC contained in a consent decree negotiated with lawyers for the EEOC and the Department of Justice. Shippers hired the black truck driver involved in the accident under the affirmative action program, and now sues the government under the Federal Tort Claims Act for indemnity on the theory that it would not have hired the black truck driver if the consent decree had not required it to "lower its standards."

The complaint must be dismissed for failure to state a cause of action. The complaint does not allege any negligent or wrongful conduct on the part of the United States as required by the Federal Tort Claims Act as interpreted by the Supreme Court in *Laird v. Nelms*, 406 U.S. 797, 799 (1971), and cases cited there. In addition, the action of the government in instituting and pursuing a civil rights action against Shippers and in negotiating and reducing to judgment a consent decree falls within the discretionary function exception to the waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. § 2680(a). See *Dalchite v. United States*, 346 U.S. 15 (1952); and the discussion of *United States v. Faneca*, 332 F.2d 872 (5th Cir. 1964) contained in *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975).

Accordingly, the judgment of the District Court dismissing the third party complaint filed by Shippers Dispatch, Inc. against the United States is hereby affirmed.

**JUDGMENT OF THE UNITED STATES
DISTRICT COURT**

(Filed October 28, 1976)

No. C75-1084

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MONICA MALONE, *et al.*,
Plaintiffs,

vs.

WILLIE HALL and SHIPPERS DISPATCH, INC.,
Defendants.

JUDGMENT

The Court having rendered its decision herein granting the motion of third-party defendant to dismiss the third-party complaint of Shippers Dispatch, Inc.,

IT IS, THEREFORE, ORDERED that the United States of America is dismissed as defendant to the third-party complaint of Shippers Dispatch, there being no just reason to delay entry of such dismissal pursuant to Fed. R. Civ. P. 54(b).

IT IS FURTHER ORDERED that the claims of plaintiffs Malone against defendants Willie Hall and Shippers Dispatch, Inc. be tried separately from the claims in the third-party complaint of Shippers Dispatch, Inc.

This judgment incorporates the Memorandum and Order filed in this case today.

/s/ JOHN M. MANOS

United States District Judge

**MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT**

(Filed October 28, 1978)

Case No. C75-1084

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MONICA MALONE, *et al.*,
Plaintiffs,

v.

WILLIE HALL,
Defendant,

and

SHIPPERS DISPATCH, INC.,
Defendant and Third-Party Plaintiff,

v.

UNITED STATES OF AMERICA,
Third-Party Defendant.

MEMORANDUM AND ORDER

MANOS, J.

This is a diversity action in which plaintiff seeks compensatory damages for the wrongful death of plaintiffs' decedent, Lawrence Malone, and for personal injuries to plaintiffs Monica and Carol Malone, arising out of an automobile accident with defendant Hall on September 3, 1975, in Lorain County, Ohio. Defendant Shippers Dispatch, Inc. [Shippers] seeks indemnification from the United States as a third-party defendant, asserting that it was

compelled to hire defendant Hall, whose qualifications did not meet Shippers' prior standards, in order to comply with the affirmative action mandates of a consent order, in a suit instituted by the Attorney General on behalf of the United States, to which Shippers was a party.¹ Jurisdiction is purportedly invoked pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2675.

Third-party defendant United States moves to dismiss the third-party complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, pursuant to Rules 12(b) (1) and (6), respectively. Further, the United States seeks a protective order, pursuant to Rule 26(c), Fed. R. Civ. P., with respect to the answer of interrogatories propounded by Shippers, pending a ruling on the aforesaid motion to dismiss.

In light of the restrictions imposed by the sovereign immunity doctrine on litigation against the United States, it is imperative that Shippers, in order to confer jurisdiction herein, must strictly adhere to the specific mandates of the jurisdictional statute upon which it relies. See, *United States v. Sherwood*, 312 U.S. 584, 490 (1940).

In support of the asserted lack of subject matter jurisdiction, the United States maintains that Shippers has failed to allege any of the required jurisdictional elements of §1346(b), which provides in pertinent part:

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages,

1. See, *United States of America v. Trucking Employers*, Case No. 74-453 (D.C., March 20, 1970).

accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Although sensitive to its obligation to construe the pleading most favorably to Shippers, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 42, 45 (1957), the Court concludes that the motion to dismiss is well-taken.

Shippers' cause of action against the United States is predicated upon the following allegations:

"(9) . . . that by reason of litigation initiated against it wherein the United States of America and Equal Employment Opportunity Commission were Plaintiffs and Shippers Dispatch, Inc., one of the defendants, as set forth in United States District Court for the District of Columbia, Civil Action Case No. 74-453, in their decree filed May 30, 1974, established mandatory provisions for the qualification for drivers to be hired subsequent to said date, as well as ratios relating thereto wherein a minimum of thirty-three and one-third percent (33-1/3%) of said drivers hired subsequent to the aforesaid date were to be of specified minority in origin and that such qualifications and/or standards, although possibly in excess of the minimum standards as promulgated by the Department of Transportation, were less than qualifications and standards as adopted by the Third-Party Plaintiff herein, to wit: SHIPPERS DISPATCH, INC., all of which has resulted

in increased accident exposure upon the highways and attendant costs thereof, all to the detriment of Third-party Plaintiff, SHIPPERS DISPATCH, INC.

"(10) Third-Party Plaintiff further says that pursuant to the aforesaid judicial decree of the Equal Employment Opportunity Commission it was compelled to hire one WILLIE HALL, a Defendant herein, on June 25, 1974, whose qualifications as an over-the-road driver did not meet the standards of SHIPPERS DISPATCH, INC. and that subsequent thereto one WILLIE HALL was involved in the aforesaid accident occurring on or about September 3, 1975, wherein one party claims damages for wrongful death and two other parties for multiple and severe personal injuries, claiming monetary damages in the aggregate against SHIPPERS DISPATCH, INC. in the amount of Two Million, Three Hundred, Fifty Thousand Dollars (\$2,350,000.00)."

Apparent from the foregoing is the patent insufficiency of such allegations for invocation of jurisdiction pursuant to the Federal Torts Claims Act. Shippers' complaint does not charge any Government employee, with a negligent or wrongful act.

Shippers attempts to cure these data defects by stating in its brief that "government representatives" were "negligent in preparing and drafting pertinent portions of the 'Partial Consent Decree'" The Court is foreclosed from considering the sufficiency of such assertions relative to §1346(b) inasmuch as they are included in counsel's legal memoranda, not a pleading, and thus are not part

2. See, Shippers' Brief in Opposition to Motion to Dismiss Third-Party Complaint, at 7.

of the record herein.³ See, *Sardo v. McGrath*, 196 F.2d 20, 23 (D.C. 1952); *United States v. Malkin*, 317 F. Supp. 612, 614, fn. 6 (D.C. N.Y. 1970); *Garcia v. United States*, 108 F. Supp. 608, 615 (Ct. Cl. 1952); *Brookins v. Chrysler Corp.*, 381 F. Supp. 563, 566 (D.C. Mich. 1974).

Accordingly, the Court dismisses the third-party complaint pursuant to Rule 12(b)(1), and the United States' Rule 12(b)(6) and Rule 26 motions need not be considered. See, *Gibbs v. Buck*, 307 U.S. 66, 71-72 (1939); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 188-89 (1936). *Dorfman v. Chemical Bank*, 56 F.R.D. 363, 364-65 (D.C. N.Y. 1972).

3. Even if this Court considered the factual material in Shippers' brief "well pleaded," it still would not satisfy the requirements of 28 U.S.C. §1346(b). In its brief Shippers charges the Government officials who drafted the *Trucking Employer's* consent decree acted with "negligence." See, Shippers' Brief in Opposition to Motion to Dismiss Third-Party Complaint, at 5. Government officers who prepare litigation materials while enforcing the law are absolutely immune from suits seeking damage awards against them. See, *Imbler v. Pachtman*, 96 S.Ct. 984, 991-92 (1976); *Yaselli v. Goff*, 12 F.2d 396, 404-06 (2nd Cir. 1926); *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949), cert. den. 339 U.S. 949; *Cooper v. O'Connor*, 99 F.2d 135, 140-41 (D.C. Cir. 1938); *Anderson v. Rohrer*, 3 F. Supp. 367, 368 (S.D. Fla. 1933); *Pearson v. Reed*, 44 P.2d 592 (Cal. App. 1935); *Anderson v. Manley*, 43 F.2d 39 (Wash. 1935). Since the Government officials who Shippers argues were negligent possess an absolute immunity, there is no basis for Shippers to recover a money award from the United States Government on a *respondeat superior* theory absent a highly specific statutory authorization for such a recovery. Compare, *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388, 412, 421-24 (1971) (Burger, Chief Justice, concurring); *Stone v. Powell*, 96 S.Ct. 3052, 3055 (1976) (Burger, Chief Justice, concurring). Furthermore, Shippers must be barred by *res judicata* from asserting a claim against the Government because it acquiesced in the consent order which is both an agreement and a final judgment. Also, assuming, purely *arguendo*, that the United States Government is chargeable with negligence in drafting the terms of the *Trucking Employer's* consent decree Shippers must be guilty of contributory negligence for agreeing to that assertedly, negligently drafted decree. Such contributory negligence would bar their recovery.

Pursuant to Fed. R. Civ. P. 54(b) the Court expressly determines that there is no just reason to delay the entry of a final judgment dismissing the Government and instructs the clerk to prepare a final judgment dismissing Shipper's third-party complaint against the United States of America. Because of the Court's Rule 54(b) determination, it orders plaintiff Malone's claims against defendants Hall and Shippers tried separately from the claims in Shippers' third-party complaint. See, Fed. R. Civ. P. 42(b).

IT IS SO ORDERED.

/s/ JOHN M. MANOS
U.S. District Judge

STATUTES INVOLVED

28 U.S.C. §1346

§ 1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

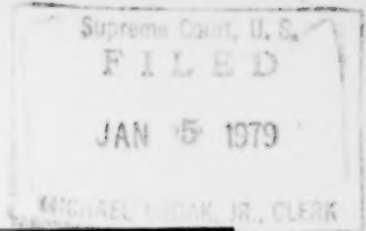
28 U.S.C. §2680

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

No. 78-790



In the Supreme Court of the United States

OCTOBER TERM, 1978

SHIPPERS DISPATCH, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner, a trucking company, was sued for wrongful death and personal injuries by plaintiffs who alleged that one of petitioner's truck driver employees had been negligent. Petitioner then filed a third-party complaint under the Federal Tort Claims Act, 28 U.S.C. 1346(b), seeking indemnification from the United States. Petitioner's theory was that it had hired the truck driver involved in the accident under the compulsion of a consent decree in a civil rights action initiated by the United States and that the government was therefore primarily responsible for the accident. Petitioner contends that the court of appeals erred in concluding that its complaint failed to state a cause of action. Petitioner also asserts that requiring it to assume financial responsibility for employees it hired pursuant to the consent decree amounts to an unconstitutional taking of property without just compensation. These claims are insubstantial.

1. In November 1975, Monica and Carol Malone filed suit against petitioner in state court, seeking to recover damages for the death of a relative and injuries to themselves resulting from a collision between their automobile and a truck driven by Willie Hall, petitioner's employee. Petitioner removed the action to the United States District Court for the Northern District of Ohio on the basis of diversity of citizenship. It then filed a third-party complaint against the United States under the Federal Tort Claims Act, alleging that it had been compelled to hire Hall pursuant to a consent decree entered in an equal employment case brought by the United States under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* *United States v. Trucking Employers, Inc.*, Civ. No. 74-453 (D. D.C., partial consent decree entered March 20, 1974). Petitioner claimed that it was entitled to indemnity from the United States on the ground that the decree, that mandated a goal of filling at least one-third of its driver vacancies with black and Hispanic drivers had increased its liability for trucking accidents, because drivers such as Hall would not have been hired under its previous standards.

The district court dismissed the third-party complaint for lack of subject matter jurisdiction, noting the "patent insufficiency" of the allegations as a basis for jurisdiction under the Federal Tort Claims Act (Pet. App. A10). The court of appeals affirmed, holding that the complaint failed to state a claim because it alleged no "negligent or wrongful conduct on the part of the United States" (*id.* at A5).¹ The court of appeals also noted that the government's pursuit of the civil rights action against

¹The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(1) and did not reach the government's motion to dismiss under Fed. R. Civ. P. 12(b)(6) (Pet. App. A11). The court of appeals affirmed on the basis of Rule 12(b)(6) (*id.* at A3-A4).

petitioner was within the discretionary function exception to the waiver of sovereign immunity in the Tort Claims Act (*ibid.*).

2. The court of appeals' decision is correct and does not warrant further review. The Federal Tort Claims Act may be invoked only for a " 'negligent or wrongful act or omission' " of a government employee acting within the scope of his employment. *Dalehite v. United States*, 346 U.S. 15, 44 (1953). Accord, *Laird v. Nelms*, 406 U.S. 797, 789 (1972). Petitioner's complaint alleged only that the United States had filed a Title VII action that culminated in a consent decree pursuant to which petitioner hired the truck driver subsequently involved in the accident with the Malones and that the decree imposed hiring standards lower than those petitioner had customarily maintained. It alleged no wrongful or negligent act of any government employee. Hence, the complaint was properly dismissed for failure to state a claim.

Moreover, even if, as petitioner asserts (Pet. 5-6), his complaint should have been read to allege negligence by an agent of the government, petitioner still would not have presented a meritorious claim under the Federal Tort Claims Act. As the court of appeals correctly observed, the acts of government employees in planning, prosecuting, and settling a Title VII enforcement action necessarily fall within the discretionary function exception to the Act, 28 U.S.C. 2680(a). *Midwest Growers Co-op Corp. v. Kirkemo*, 533 F. 2d 455, 465 (9th Cir. 1976); *Smith v. United States*, 375 F. 2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967); *United States v. Faneca*, 332 F. 2d 872 (5th Cir. 1964).²

²28 U.S.C. 2680(a), in pertinent part, excludes from the coverage of the Act "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Petitioner's

Finally, petitioner's contention (Pet. 9-10) that the consent decree exposed it to increased liability for accident claims and thereby constituted a taking without just compensation was not raised below and should not be considered by this Court. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). This contention is, in any event, wholly insubstantial. If petitioner felt aggrieved by the actions of the government in the Title VII lawsuit, its remedy was to defend its position in that lawsuit and to appeal if it did not prevail. The propriety of the consent decree cannot be collaterally attacked in an action under the Federal Tort Claims Act. Furthermore, the Just Compensation Clause is inapplicable here because it refers "only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870). See also *Penn Central Transportation Co. v. New York City*, No. 77-444 (June 26, 1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

argument analogizing the present case to medical malpractice actions is unsound (Pet. 8). Decisions concerning medical treatment are not discretionary policy judgments analogous to decisions concerning what relief is necessary to vindicate rights under federal statutes.